A **SABINDO NUSANTARA SDN BHD & ANOR**

v.

MAJLIS PERBANDARAN TAWAU & ORS AND ANOTHER CASE

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI J
[SUITS NO: T(21) 12-2006 & T(21) 13-2006]
3 SEPTEMBER 2010

C ***LAND LAW:*** *Adverse possession - Limitation - Whether plaintiff's claim for repossession of land barred by 20-year adverse possession of it by defendant - Whether s. 6(2) Sabah Land Ordinance protected plaintiff against adverse possession claim - Whether plaintiff acted in defiance of condition of alienation of land that it be returned to government after development - Whether plaintiff held land as bare trustee for government*

D ***LAND LAW:*** *Indefeasibility of title and interest - Land Ordinance (Sabah Cap 68) - Alienation of land to plaintiff on condition that land surrendered to government after development - Whether plaintiff obtained indefeasible title - Whether plaintiff a bare trustee - Whether plaintiff had knowledge that land ought to be surrendered*

E

The Sabah Government had alienated land for commercial development to the first plaintiff ('Sabindo') on condition that the area meant for open spaces, car parks, road and market square would be surrendered back to the government after development of the land. However, the title F deeds given to Sabindo to cover the land for the car park, road reserve and open space ('the two title deeds') failed to contain the condition requiring Sabindo to surrender the two title deeds back to the government after development. The first defendant ('the Council') later took possession of the land meant for the car park and open space but G when it asked for the two title deeds Sabindo refused to surrender them. Although Sabindo continued to be the registered owner of the lands in the two title deeds, it was never consulted when the Council entered into joint-venture and privatisation projects with other parties to develop shop lots and to run a car park business on the lands covered by the H two title deeds. In the instant action Sabindo sought to recover possession of the lands covered by the two title deeds saying that as the registered owner thereof it had indefeasible title and right to them for 99 years and that the Council had usurped possession of the lands without paying compensation contrary to art. 13 of the Federal Constitution. The Council counterclaimed for an order that Sabindo I either surrender the two title deeds to the Land and Survey Department, or execute a transfer of them in favour of the Council. The Council also contended that Sabindo's claim was statute-barred by virtue of Item 110

and/or Item 112 of the Schedule to the Limitation Ordinance as the action was filed more than 12 years after Sabindo had been dispossessed of the lands.

Held (dismissing the claims with costs and allowing the counterclaim with costs):

(1) The letter of offer to alienate the land clearly stated that Sabindo was to surrender back to the government after development all areas marked road reserve, open space, car park and the market square. Although there was no admission by the government that it had made a mistake in not cancelling the two title deeds, there was no doubt the omission was a genuine mistake. Sabindo could not be allowed to profit from the government's mistake by claiming ownership of the two titles and possession of the lands under them. (para 18)

(2) Sabindo being in equity a bare trustee for the Council representing the government, the two title deeds passed back to the government once development was completed because on the happening of that event Sabindo must be regarded as having divested itself of its interest in the land. (para 22)

(3) Sabindo itself acknowledged the need to surrender the two title deeds to the government, first by causing its solicitors to forward the original titles together with other related documents to the Council by registered post and, when it discovered the original titles were lost, applying for certified true copies of same and again forwarding them to the Council. These actions on Sabindo's part manifested its knowledge that the government had made a mistake and that it had no right to retain the two title deeds. (paras 19-22)

(4) As the instant action was only instituted in 2006, 20 years after the Council had taken possession of the lands, Sabindo's action was statute-barred. Sabindo's argument that under s. 6(2) of the Sabah Land Ordinance its legal right or title to the lands was not extinguished by the Council's adverse possession of it did not apply as s. 6(2) only came into force on 31 December 1997 whereas the Council had been in possession of the car park and open space since at least 1982 or 1983 without protest from the plaintiffs. Adverse possession had already set in to bar the plaintiffs' claim latest by 1994 or 1995 long before s. 6(2) came into force. (paras 25 & 26)

(5) Even if s. 6(2) of the Land Ordinance applied retrospectively, Sabindo still could not avail itself of the protection accorded by that provision because it only protected 'the owner or any person entitled to an interest therein'. Sabindo, being a bare trustee, could not claim to be the owner or the person entitled to the said land. (para 28)

Case(s) referred to:

Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad (formerly known as Time Engineering Sdn Bhd) [1996] 2 CLJ 561 FC ***(refd)***

Datuk Harris Mohd Salleh v. Seck Mun Foo [1999] 2 CLJ 545 CA ***(refd)***

Fraser v. Walker [1967] 1 All ER 649 ***(refd)***

Lee Chi Min & Anor v. Superintendent of Land and Survey Department, Kuching [1980] 1 LNS 196 FC ***(refd)***

Ramdal v. Chetu AIR 1958 (Punjab) 335 ***(refd)***

Seck Mun Foo v. Datuk Harris Mohd Salleh [1997] 1 CLJ 321 HC ***(refd)***

Legislation referred to:

Federal Constitution, art. 13

Land (Control of Sub-division) Ordinance (Sarawak Cap 82), s. 10

Land Ordinance (Sabah Cap 68), s. 6(2)

Limitation Ordinance (Sabah Cap 72), ss. 6, 26

(Suit No: T(21) 12-2006)

For the plaintiffs - Yunof Maringking; M/s Maringking & Co

For the 1st defendant - Zaleha Rose Pandin; SFC

For the 2nd, 3rd, 4th defendants - Brandon Keith Soh; M/s Ronny Cham & Co

(Suit No: T (21) 13-2006)

For the plaintiffs - Yunof Maringking; M/s Maringking & Co

For the 1st defendant - Zaleha Rose Pandin, SFC

For the 2nd defendant - Liew Hon Min; M/s Liew Hon Min & Co

Reported by Ashok Kumar

JUDGMENT

Abdul Rahman Sebli J:

The Agreed Facts

[1] In 1971 the 1st plaintiff applied for state land ("the said land") in Tawau for commercial development and was approved for 21 acres only by the Chief Minister's office. The period granted was 99 years subject to the terms and conditions stipulated in the letter of offer dated 13 July 1971.

[2] By letter dated 8 August 1973, the Director of the Land and Survey Department confirmed alienation of the said land for 99 years but the sites for open spaces, car parks, road and market square ("the car park and open space") thereon shall be leased for five years only commencing on 1 January 1972.

[3] A provisional lease No. 106290831 was then issued by the State Government ("the government") for an area measuring 31.50 acres and valid only from 1 January 1972 to 31 December 1978. The terms expressly required the 1st plaintiff to surrender back to the government the car park and open space after the development of the said land.

[4] When the 1st plaintiff surrendered the provisional lease for subdivision, the government issued to the 1st plaintiff TL No. 107522985 measuring 18.11 acres for the purpose of a car park and TL No. 107523008 measuring 3.12 acres for the purpose of a road reserve and open space ("the two title deeds"), both for a term of 99 years. The term which required the 1st plaintiff to surrender back the two title deeds to the government after development was deleted.

[5] The two title deeds were then charged to the then bank Bumiputra Berhad Tawau Branch as security for a loan of RM10 million which the 1st plaintiff borrowed to finance the development of the said land. The two title deeds were only redeemed by the 1st plaintiff in 1988.

[6] When later the 1st defendant insisted that the 1st plaintiff surrender back the two title deeds to them the 1st plaintiff refused to do so and it remains the registered owner of the two title deeds. However the 1st defendant had since taken possession of the car park and open space.

[7] On 28 January 1993 the 1st defendant in Suit No. T(21) 13-2006 and the 3rd defendant entered into a joint venture agreement and a supplementary agreement dated 16 August 1997 to develop commercial shop lots on the car park and open space.

[8] Subsequently the 1st and 2nd defendants in Suit No. T(21) 13-2006 entered into privatisation agreements on 28 August 1993 and on 5 May 1998 to run the car park business.

[9] On 13 December 1996 the 1st and 2nd defendants and on 16 December 1996 the 1st and 3rd defendants in Suit No. T(21) 12-2006 respectively entered into a joint venture agreement and also created a power of attorney to construct commercial shop lots on the car park and open space.

[10] The 1st plaintiff as the registered owner of the said land was never consulted nor did it consent to the joint venture agreements between the defendants to run the car park business and to construct commercial shop lots on the said land.

[11] The road and car parking lots in TL No. 107522985 have been used by the general public since the completion of the Bandar Sabindo project in 1979 and the 1st defendant has been maintaining and up keeping them up to this day.

The Claims

[12] The 1st plaintiff is claiming to recover possession of the land which forms part of the two title deeds. The 1st defendant is counterclaiming for an order that the 1st plaintiff be ordered to complete the surrender of the two title deeds to the Land and Survey Department

A or in the alternative that the 1st plaintiff be ordered to complete the memorandum of transfer to the 1st defendant. The 3rd defendant in Suit No. T(21) 13-2006 had been struck off as a party and thus did not appear during the trial.

B **The Issue**

[13] The plaintiffs' case is that the 1st plaintiff as registered owner of the said land has indefeasible title thereon for 99 years and that the 1st defendant acted *ultra vires* art. 13 of the Federal Constitution when it took possession of the said land without paying any compensation.
C The decision of the Privy Council in *Fraser v. Walker* [1967] 1 All ER 649 was cited in support of the plaintiffs' contention that the 1st plaintiff enjoys indefeasibility property rights on the said land or legal estate therein which he is immune from attack or adverse claim during the 99 years tenure of the title deeds.

D **[14]** In my view the crucial question in relation to this issue, and this applies to all parties in both suits is whether the government had made a *bona fide* mistake in not cancelling the two title deeds and if so whether the 1st plaintiff is a bare trustee holding the same for the benefit of the 1st defendant. If the answer is in the affirmative then the
E 1st plaintiff does not enjoy indefeasibility of title over the said land although registered in its name and that consequently the 1st defendant did not contravene any law when it took possession of the same.

The Applicable Law

F **[15]** Unlike the position in Peninsular Malaysia and Sarawak, there is no provision in the Sabah Land Ordinance ("the Land Ordinance") conferring indefeasibility of title or interests in land which is a feature of central importance to the Torrens system of land registration. The concept of land tenure in Sabah is a modified Torrens system of
G land registration which recognises the concept of bare trust in a vendor/purchase situation: see *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad (formerly known as Time Engineering Sdn Bhd)* [1996] 2 CLJ 561 FC per Edgar Joseph Jr FCJ at pp. 576 and 580.

H **[16]** The decision of the High Court in *Seck Mun Foo v. Datuk Harris Mohd Salleh* [1997] 1 CLJ 321 and affirmed by the Court of Appeal in *Datuk Harris Mohd Salleh v. Seck Mun Foo* [1999] 2 CLJ 545 is another example of the acceptance of the concept of bare trustee in Sabah. In that case Suleiman Hashim J said at p. 559:

I > With respect, a person who has parted with his land and has received the purchase money as the defendant in the present case is bare trustee of the land. His name may appear on the land title but he may assert no legal rights over it because the equitable and beneficial ownership has passed to the buyer. Since the plaintiffs have proved

that the defendant has sold the land to Berdikari the defendants only a bare trustee of the land even though his name still appears on the land title. I have for my guidance the case of *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116 where it was held that the registered proprietor having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent who was the equitable owner, also *Temenggong Securities Ltd & Anor v. Registrar of Titles Johore & Ors* [1974] 2 MLJ 45.

[17] The facts in *Lee Chi Min & Anor v. Superintendent of Land and Survey Department, Kuching* [1980] 1 LNS 196; [1981] 1 MLJ 93 FC bear a striking similarity to the facts in the present case. In that case, the appellants owned a piece of land in Kuching North Land District. They applied for sub-division and was approved subject to certain conditions. Among the conditions was that the two subdivided lots were to be surrendered to the State Government free of charge for use as open space. Subdivided titles were prepared including the two open space lots. However instead of keeping the two open space titles the State Government released them to the appellants. The State Government also forgot to endorse on the two titles that they were to be used as an open space. For the next ten years the State Government demanded quit rent for the two titles and the appellants dutifully paid the quit rent. In order to rectify the error the Superintendent of Land and Survey attempted to rectify the register by using s. 10 of the Land (Control of Sub-division) Ordinance (Sarawak Cap 82). The attempt was challenged by the appellant and the High Court decided in favour of the respondent. The appellants appealed to the Federal Court but the appeal was dismissed. Suffian LP said at p. 95:

Here permission to subdivide was given on condition that the two lots should be surrendered to Government without any charge for use as open space. The condition was agreed to by the appellant. Government need not have issued title in regard to these two lots, or having issued them it should have registered them in their own name as owners. Instead they issued them, and in the name of the appellants without mention of the special conditions and then handed them over to the appellants. The appellants must have rubbed their eyes in disbelief when the documents of title landed on their laps. The appellants knew all this was a mistake, and yet kept quiet. I do not think that they should be allowed to profit from Government's mistake.

[18] Similarly in the present case although there is no admission by the government that it made a mistake in not cancelling the two title deeds there can be no doubt that the omission was a genuine mistake. The letter of offer to alienate dated 22 April 1974 clearly states that the 1st plaintiff was to "surrender back to the government after development of all the areas marked road reserve, open space, car park and the

market square" (pp. 23-26 of encl. 109). The plaintiff cannot be allowed to profit from the government's mistake by claiming ownership of the two titles and consequently to possession of the land forming part of the two title deeds.

[19] The 1st plaintiff itself acknowledged the need to surrender the two title deeds to the government. This is evidenced by the fact that on 18 August 1983 the 1st plaintiff through its solicitors forwarded the original titles, partial satisfaction and release, the surrender of title and the certificate of payment form in respect of the two title deeds by registered post to the 1st defendant for the purpose of surrendering the road reserve, car park and open space to the 1st defendant.

[20] Then on 10 January 1985 the 1st plaintiff had, through its Executive Director Datuk Tsen Chi Henn, swore a statutory declaration explaining clearly how the titles had been delivered to its solicitors for the purpose of surrender to the Tawau Municipal Council and that the titles were lost. These are contained in paras. (3) and (5) of the statutory declaration (pp. 68-69 of encl. 112) as follows:

> (3) On or about the 18th day of August 1983, my Solicitors sent the said titles together with other related documents by registered mail under registration No. 2998 to the Tawau Municipal Council for surrender to them:
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> (5) I now verily believe that the said titles have been lost and would make an application to the Authority for the issue of certified true copies for replacement and should I subsequently recover the lost copies of the said titles I undertake to surrender them to the proper Authority for disposal.

[21] Finally, on 6 July 1988 the 1st plaintiff forwarded the certified true copies of title (as replacements for the original titles) and the surrender of title documents to the 1st defendant for the purpose of surrendering them to the 1st defendant.

[22] All these actions on the part of the 1st plaintiff is a manifestation of its knowledge that the government had made a mistake and that it had no right to retain the two title deeds. Since it was a condition of the offer to alienate that the 1st plaintiff was to surrender the car park and open space to the government after completion of the development the 1st plaintiff was legally bound to do so once the land had been developed. The 1st plaintiff cannot have the cake and eat it. The 1st plaintiff being in equity a bare trustee for the 1st defendant representing the government, the two title deeds passed back to the government once development was completed because on the happening of that event the 1st plaintiff must be regarded as having divested itself of its interest in the land.

[23] I am therefore unable to accept Mr Yunof Maringking's argument that since the government had not cancelled the two title deeds the 1st plaintiff as the registered owner has indefeasible title thereon during the 99 years tenure of the title deeds.

Limitation Period And Adverse Possession

[24] It is the 1st defendant's contention in the alternative that the plaintiffs' claim is statute barred by virtue of item 110 and or item 112 of the Schedule of the Limitation Ordinance (Sabah Cap. 72), ie, that the action was filed more than 12 years after the date of dispossession. Section 26 of the Limitation Ordinance provides as follows:

> At the determination of the period limited by this Ordinance to any person for instituting a suit to recover possession of immovable property the right and title of such person to the immovable property, for the recovery whereof such suit might have been instituted within such period, shall be extinguished.

[25] I agree with the 1st defendant because the present action was only instituted in 2006, 20 years after the 1st defendant took possession of the land after completion of the development in the 1980's. Counsel for the plaintiffs argued that by virtue of s. 6(2) of the Land Ordinance the adverse possession of the land by the 1st defendant did not extinguish the 1st plaintiff's legal right or title to the said land. Section 6(2) of the Land Ordinance provides:

> Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the owner or any person entitled to an interest therein, and accordingly, any written law relating to the limitation of suits in force in Sabah shall in no circumstances operate to extinguish any title or interest in land.

[26] However it has been brought to my attention that the above provision only came into force on 31 December 1997 *vide* Gazette Notification No. 4 of 1997 whereas the 1st defendant had been in possession of the car park and open space since at least 1982 or 1983 without any protest by the plaintiffs. Clearly therefore adverse possession had already set in to bar the plaintiffs' claim latest by 1994 or 1995, long before s. 6(2) of the Land Ordinance came into force.

[27] The doctrine of adverse possession was explained by AN Bhandari CJ in *Ramdal v. Chetu* AIR 1958 (Punjab) 335 as follows:

> Adverse possession, as its words imply, must be actual possession of another's land with intention to hold it and claim it as his own. It must commence with the wrongful dispossession of the rightful owner at some particular time; it must commence in wrong and maintained

A against right. It must be actual, open, notorious, hostile, under claim or right, continuous, and exclusive and maintained for the statutory period. Indeed it should be open and exclusive as to leave no doubt as to the intention of the occupant, so notorious that the owner may be presumed to have knowledge of the adverse claim and so continuous as to furnish a cause of action every day during the required period.

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[28] In my view even if s. 6(2) of the Land Ordinance applies on the basis that it operates retrospectively still the 1st plaintiff cannot avail itself of the protection accorded by that provision because the provision accords protection only to "the owner or any person entitled to an C interest therein". The 1st plaintiff being a bare trustee cannot claim to be the owner or the person entitled to the said land.

Conclusion

[29] For all the above reasons the plaintiff's claims against the 1st D defendant in both suits were dismissed with costs, to be taxed unless otherwise agreed. Since the liabilities of the other defendants are dependent on the liability of the 1st defendant likewise I dismiss the claim against each of them in both suits.

[30] As for the counterclaim I am satisfied that the 1st defendant is E entitled to the orders sought. In the circumstances the counterclaim was allowed in terms.

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